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October 9, 2003

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FILE REFERENCE No 2498

***Via Federal Express
Fifteen Copies***

The Honorable Bryant L. VanBrakle, Secretary
Federal Maritime Commission
800 North Capitol Street, NW.,
Washington, DC 20573-0001

**Re: MBC Brokers, Inc. — Comments in Support of
National Customs Brokers and Forwarders
Association of America, Incorporated's Petition
FMC Docket No. P5-03.**

Dear Secretary VanBrakle:

We represent MBC Brokers Inc. ("MBC") of Manhattan Beach, California — an Ocean Transportation Intermediary registered with the Federal Maritime Commission ("FMC") under the license numbers 018412 and 0184 12F. On behalf of our client, we submit these comments in support of the petition of August 9, 2003 filed by the National Customs Brokers and Forwarders Association of America, Inc., ("NCBFAA") requesting an exemption for Non-Vessel Operating Common Carriers ("NVOCCs") from the tariff publication provisions of Sections 8 and 10 of the Shipping of 1984 ("the Act.") The FMC docket number for this petition is P5-03.

Pursuant to Section 16 of the Shipping Act of 1984, (46 U.S.C. Appx. § 1715 and 46 C.F.R. §§ 502.67, 502.69) the NCBFAA petitions for an exemption from the provisions of Sections 8 and 10 of the Shipping of 1984, which require non-vessel ocean common carriers ("NVOCCs") to establish, publish, maintain and enforce tariffs setting forth ocean freight rates. Alternatively, the NCBFAA requests that the FMC consider a more limited exemption and rulemaking that would allow NVOCCs to establish "range rates."

As permitted by 46 U.S.C.S. Appx. § 1715, MBC wishes to make its comments on this proposed exemption prior to the initiation of any formal rulemaking process by the FMC. As a licensed and bonded NVOCC, MBC is a member of the class for which NCBFAA seeks an exemption and so is an “interested person” within the meaning of 46 C.F.R. § 502.67(c). The FMC formally solicited comments from such interested parties in the notice published on August 19, 2003 in Vol. 68, No. 160 of the *Federal Register*.

Section 16 of the Ocean Shipping Reform Act of 1998 (“OSRA”), as codified in 46 U.S.C.S. Appx. § 1715, provides that the FMC may exercise its power to exempt a class from a requirement of the Act such so long as such exemption will not result in substantial reduction in competition, or be detrimental to commerce. For the forgoing reasons, MBC submits that the continued enforcement of the publication requirements of Sections 8 and 10 of the Shipping Act of 1984 against NVOCCs has already resulted in a substantial reduction in competitiveness between NVOCCs and Vessel Operating Common Carriers (“VOCCs”) and acts as a barrier to maritime commerce by limiting choices available to the shipping consumer. By contrast, the exemption of NVOCCs from these publication requirements would remove a major barrier to maritime commerce and would result in increased competitiveness in the shipping industry.

I. The Current Publication Requirements Are Unduly Burdensome on the Typical NVOCC Small Business.

Our client informs us that the tariff publishing requirements imposed upon NVOCCs are too complicated. As an NVOCC making under \$26.5 million dollars in revenue annually, MBC meets the standard for a “small business” as set forth in the North American Industry Classification System (“NAICS”) utilized by the Small Business Administration. The current publication requirements of 46 C.F.R. § 520 are too burdensome to the owner of the typical small-business NVOCC who operates with a minimal staff. MBC, like many NVOCCs, MBC does not have the staff resources needed to comply with the current publication requirements of Section 8 and 10 of the Act.

By contrast, VOCCs often have full staff compliments capable of handling what few tariff-publishing obligations the VOCC may have outside of their confidential service contracts. This places the NVOCC at yet another disadvantage to the VOCC in terms of competition. Those NVOCCs who are not able to compete with larger ocean common carriers will offer fewer services to the shipping public, resulting in reduced competition and fewer choices to the consumer.

Per 46 U.S.C. § 1702, NVOCCs may only enter into service contracts in the capacity of a shipper, making them dependant upon the rates published by "ocean common carriers", namely the VOCCs, who have a patently unfair advantage over the NVOCC in this regard. The rates published by VOCCs are changing constantly, and it is almost impossible for a single owner/operator of an NVOCC to keep up with these changes. To avoid the ever-present threat of inadvertently charging a customer rates inconsistent with those published, the small NVOCC is forced to monitor the changes in VOCC rates constantly, and evaluate how they effect the rates currently charged to the NVOCC's customer. The NVOCC must then publish the new rates while notifying their customers of the changes. This administrative burden is simply too much for the modestly-staffed NVOCC to handle profitably, and provides no benefit to the shipping customer who rarely accesses the NVOCC's published rates anyway.

II. The Current Publication Requirements Force NVOCCs to Operate at a Loss Whenever Ocean Common Carriers Raise Their Rates:

Under 46 C.F.R. § 520.8(a), any new rate that increases cost to the shipper cannot take effect until 30 calendar days after date of publication. The NVOCC who complies with this outdated rule is penalized with unnecessary financial loss.

Understandably, if the ocean common carrier upon whom an NVOCC depends increases their rates for certain services, then the NVOCC must raise the rates they charge to their own shipping customers as well to preserve profits. The NVOCC who complies with 46 C.F.R. § 520.8(a) must often operate at a loss on some shipments by paying the increased rate to its ocean common carrier while charging the same rate to their customers for the prescribed thirty day period.

The publication requirements of § 520.8 are an artificial hindrance to ocean commerce. The exemption of NVOCCs from the current tariff publication obligations will allow NVOCCs to keep their rates fluid and profitable regardless of how often the rates charged them by VOCCs may change. As small business owners, NVOCCs cannot afford to spend to considerable amount of time and resources necessary to update rates to keep them both profitable and compliant with the publication requirements of Sections 8 and 10 of the Act.

III. Pre-Voyage Negotiation and Quoted Rates Are the Realities of the Shipping Marketplace — not Tariffs Published Subsequent to a Shipping Transaction:

Requiring NVOCCs to publish rates is a barrier to competition and reduces the choices available to the shipping consumer.

The current realities of the shipping marketplace are that shipping customers negotiate specific rates for specific routes and container needs in order to obtain rates and services tailored to their own particular needs. The requirement of Title 46 C.F.R. upon NVOCCs to publish tariffs and then charge their customers rates based only on what is currently published is a pointless barrier to this negotiation process, and limits competition.

Very few, if any, importers or exporters access the websites of NVOCC service providers to determine the rates available. Typically, the small NVOCC receives an inquiry from a prospective customer via telephone, facsimile or e-mail. The customer's needs are extremely varied with regard to ocean routes, type of merchandise and container size needed, and frequency of shipments. Often the customer's particular shipping needs will not be addressed by the rates currently published on the NVOCC's electronic tariff.

To meet these needs, the NVOCC must research the buying rates and routes and which carriers are available for the desired shipping lane before determining the NVOCC's cost and presenting a quote to the customer. The NVOCC and their customer then agree upon a rate, typically during the course of a telephone conversation or two along with some e-mails. Once the rate is agreed upon, the NVOCC publishes that rate as prescribed by regulation, although typically the shipping customer is not even aware that the rate is published, and does not know where to look for the rate.

The realities of the shipping marketplace also dictate that an NVOCC may still be in the process of negotiating rates with his shipping client when the cargo is already in transit. The requirement of 46 C.F.R. § 520.7(a) that the rates applicable to any given shipment shall be those in effect on the date the cargo is received by the common carrier or their agent is clearly outdated in the modern mode of ocean commerce. To avoid non-compliance with § 520.7(a), an NVOCC must often delay the acceptance of cargo for transport while their electronic tariff is updated to reflect the recently negotiated rate. Such delays impede the flow of vital import commerce to the United States and cause unnecessary and costly delays to both NVOCCs and their shipping customers.

The exemption of NVOCCs from the tariff publication requirements of Title 46 C.F.R. will reflect the modern realities of in-route rate negotiation in

the ocean shipping marketplace. Such an exemption would eliminate a major barrier to maritime commerce.

IV. Publication Expenses Erode the Small NVOCC's Profits, Discouraging Them from Offering Affordable NVOCC Services to the Public

As mentioned in the NCBFFA Petition, the majority of NVOCCs are small businesses for whom the expense of publishing has a serious effect on gross profits. This discourages the small entrepreneur from offering NVOCC services when Customs brokerage or freight forwarding services appear more profitable. The predictable result is that fewer small entrepreneurs are willing to offer NVOCC services, meaning fewer choices for the shipping customer and decreased competitiveness in the shipping market.

As an example, it cost MBC \$300 to set up its published tariff with a service provider on the Internet, and then an additional \$400 a year just to maintain its published tariff. Each time a rate is published or changed in any way on **MBC's website**, it costs an additional \$14.50. A typical monthly invoice for electronic publication services may run the small NVOCC such as MBC around \$235. During that same month, MBC may realize only \$1400 in gross profits for both its freight forwarding operations and its NVOCC services. So, a small NVOCC such as MBC typically may spend about 20% of their gross profit from all OTI services just to meet its publication obligations as an NVOCC.

Since many small entrepreneurs offer "one-stop shopping" for their import shipping customers, including Customs brokerage and either NVOCC or freight forwarding services, the costs involved in tariff publication clearly discourage these small entrepreneurs from offering NVOCC services to the public when they can perform Customs brokerage services at a more profitable rate with no publication burdens. The prohibitive expenses incurred by NVOCCs in meeting their publication obligations give an unfair advantage to the large VOCCs who are better able to absorb these costs.

V. Conclusion:

MBC offers these comments in support of NCBFFA's petition for a limited exemption for NVOCCs from the tariff publication requirements of Sections 8 and 10 of the Shipping Act of 1984. This exemption will not result in a substantial reduction in competition within the ocean transportation industry, nor will it be detrimental to commerce. Rather, the converse is true.

The continued imposition of these superfluous tariff publication requirements on NVOCCs already discourages competition with VOCCs who by

Secretary Bryant L. VanBrakle
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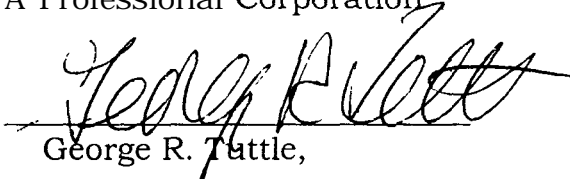
their nature are better apt to deal with the burdens of publication. As a result, commerce is adversely effected, since fewer small businesses will offer NVOCC services in the face of this competition, leaving the shipping consumer with fewer choices in meeting their shipping needs.

In the alternative, MBC wishes the FMC to consider initiating a rulemaking process pursuant to 46 C.F.R. § 502.51 for the purposes of crafting new tariff publication rules applicable to NVOCCs requiring them to publish only a range of rates for their shipping customers. Such "range rates" as proposed in the NCBFAA's petition would ease the administrative burden to NVOCCs, eliminating the need to update their published rates constantly as currently required.

Very truly yours,

Law Office of
GEORGE R. TUTTLE
A Professional Corporation

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